

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

VS.

AND

DOCKET NO. 165,127

## AWARD

**ON** the 3rd day of February, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Robert H. Foerschler, dated December 20, 1993, came on before the Appeals Board for oral argument by telephone conference.

## APPEARANCES

Claimant appeared by her attorney, Steven D. Treaster of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Stephanie Warmund of Overland Park, Kansas. There were no other appearances.

# RECORD

The record considered by the Appeals Board is the same as that listed in the Award of December 20, 1993.

## STIPULATIONS

The Appeals Board hereby adopts the stipulations listed in the Award of December

20, 1993.

### **ISSUES**

The nature and extent of claimant's disability was the only issue presented at oral argument in this appeal. The Administrative Law Judge had also made decisions regarding unauthorized and future medical expenses. Since neither of those issues were disputed on the appeal, the Appeals Board hereby adopts the finding by the Administrative Law Judge that claimant is entitled to future medical treatment upon application only and is entitled to unauthorized medical expense in the amount of \$275.00.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

(1) For injury arising out of and in the course of her employment on August 19, 1991, claimant is entitled to an award of benefits based upon twenty-eight and four-tenths percent (28.4%) permanent partial general disability.

By stipulation and by evidence presented, claimant established that she suffered injury to both upper extremities from repetitive trauma caused by the performance of her duties as an order filler for the J. C. Penny Company. The uncontradicted evidence also establishes that as a result of work restrictions resulting from her injuries, claimant will not be able to return to work at a wage comparable to the wage that she received in her work for respondent. This is true even though respondent has provided vocational rehabilitation benefits in the form of training in desktop publishing. Because she is unable to return to work at a comparable wage and because the evidence otherwise establishes that her work disability is greater than her functional impairment, claimant will be entitled to an award based upon work disability.

In determining the nature and extent of her disability, the Appeals Board must examine and consider: (1) reduction in claimant's ability to perform work in the open labor market; and, (2) reduction in claimant's ability to earn comparable wages. See Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990). In this case, two experts testified and gave opinions on these two factors. Each based his opinion on the work restrictions recommended by Dr. Zarr and agreed to by Dr. Miskew. Mr. Vander Vegt testified that claimant suffered a sixty-six percent (66%) loss in ability to perform work in the open labor market, and a forty-eight percent (48%) reduction in ability to earn comparable wage. The wage reduction was based upon a comparison between her pre-injury wage and \$5.50 per hour which he expected her to be able to earn after her injury. Mr. Gaddis testified that in his opinion the claimant suffered a twenty percent (20%) loss of access to open labor market and a twenty-five to thirty-five percent (25%-35%) loss of ability to earn comparable wage. The wage loss was calculated from comparison of \$10.00 per hour, which he understood to be the pre-injury wage, to a \$6.50 to \$7.50 per hour post-injury wage. His opinion regarding loss of access to the open labor market includes consideration of labor market access restored because of her vocational rehabilitation and training in desktop publishing.

The Appeals Board finds the opinions of Mr. Gaddis to be the better supported and more credible. He has testified in detail regarding the method used in arriving at his conclusions and provided detailed substantiation for those conclusions. From testimony given in the depositions, it appears that the opinions of Mr. Vander Vegt are, on the other hand, significantly more speculative.

The opinion of Mr. Gaddis regarding the loss of wages should, however, be adjusted. He assumed a pre-injury wage of \$10.00 per hour when, in fact, the parties stipulated to a wage of \$379.18 per week. It also appears more appropriate to compare the pre-injury wage to a \$6.00 per hour post-injury wage. The evidence establishes that claimant has, in spite of good faith efforts, been unable to obtain employment as of the date of the last hearing in this case. She had, however, received an offer for a job which would pay her \$6.00 per hour. Although she declined this offer, the Appeals Board finds it to be a reasonable basis for comparison and calculation of the wage loss factor. Accordingly, the Appeals Board finds that claimant has experienced a twenty percent (20%) loss of ability to gain employment in the open labor market and a thirty-six and eight-tenths percent (36.8%) reduction in ability to earn comparable wages.

The Appeals Board must consider both factors but need not give them equal weight. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). In this case, however, there is no reason for affording greater weight to either of the two factors and accordingly the Appeals Board weighs them equally to arrive at its determination that claimant has a twenty-eight and four-tenths percent (28.4%) permanent partial general disability.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated December 20, 1993, is hereby affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 1994.

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BOARD MEMBER

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cc: Steven D. Treaster, 10990 Quivera, Suite 200, Overland Park, KS 66210  
Stephanie Warmund, 10561 Barkley, Suite 410, Overland Park, KS 66212  
Robert H. Foerschler, Administrative Law Judge  
George Gomez, Director